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In the Supreme Court of the United States

OCTOBER TERM, 1939

STATE OF WISCONSIN, STATE OF MINNESOTA, STATE OF OHIO, and STATE OF PENNSYLVANIA, *Complainants,* v. STATE OF ILLINOIS, and THE SANITARY DISTRICT OF CHICAGO, *Defendants.*	No. 2 Original
STATE OF MICHIGAN, *Complainant,* v. STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO, et al., *Defendants.*	No. 3 Original
STATE OF NEW YORK, *Complainant,* v. STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO, et al., *Defendants.*	No. 4 Original

RETURN OF WISCONSIN, MINNESOTA, OHIO, PENNSYLVANIA, MICHIGAN AND NEW YORK AS RESPONDENTS, TO RULE TO SHOW CAUSE ISSUED ON APPLICATION OF THE STATE OF ILLINOIS, AS PETITIONER, FOR A TEMPORARY MODIFICATION OF PARAGRAPH 3 OF THE DECREE OF APRIL 21, 1930.

JOHN E. MARTIN, Attorney General of Wisconsin,
J. A. A. BURNQUIST, Attorney General of Minnesota,
THOMAS J. HERBERT, Attorney General of Ohio,
CLAUDE T. RENO, Attorney General of Pennsylvania,
WILLIAM S. RIAL, Deputy Atty. General of Pennsylvania,
THOMAS READ, Attorney General of Michigan,
JAMES W. WILLIAMS, Asst. Attorney General of Michigan,
JOHN J. BENNETT, Jr., Attorney General of New York,
TIMOTHY F. COHAN, Asst. Attorney General of New York,
HERBERT H. NAUJOKS, Special Assistant to the Attorneys General.

Filed: February 26, 1940.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come the respondents, State of Wisconsin by John E. Martin, Attorney General, the State of Minnesota, by J. A. A. Burnquist, Attorney General, the State of Ohio by Thomas J. Herbert, Attorney General, the State of

Pennsylvania by Claude T. Reno, Attorney General, and William S. Rial, Deputy Attorney General, the State of Michigan by Thomas Read, Attorney General, and James W. Williams, Assistant Attorney General, the State of New York by John J. Bennett, Attorney General, and Timothy F. Cohan, Assistant Attorney General, and Herbert H. Naujoks, Special Assistant to Attorneys General, their solicitors, and for their return to the rule to show cause issued on application of State of Illinois, as petitioner, for a temporary modification of paragraph 3 of the decree of April 21, 1930, respectfully say:

I.

Respondents admit due notice of the filing of the petition.

II.

The petition of the State of Illinois, filed herein on January 15, 1940, for a modification of paragraph 3 of the decree of April 21, 1930, was not filed within the time allowed to the parties in the above-entitled causes to apply to this Court under paragraphs 6 and 7 of said decree (281 U. S. 696, 698) for modification of said decree with reference to the times fixed for the progressive reduction and ultimate cessation of the diversion adjudged to be illegal. At the date of filing said petition, said decree had become final and *res judicata* as between the parties in this as well as in all other respects.

III.

The State of Wisconsin filed the first of these bills on July 14, 1922. The Wisconsin bill was amended on October 5, 1925, and the States of Minnesota, Ohio and Penn-

sylvania became co-plaintiffs. The amended bill sought an injunction restraining the State of Illinois and The Sanitary District of Chicago from causing any water to be taken from the Great Lakes-St. Lawrence watershed in such manner as permanently to divert the same from that watershed. On April 8, 1926, the State of Michigan filed a separate bill for the same relief. On October 18, 1926, the State of New York filed a separate bill for the same relief. Subsequently the three suits were consolidated for the purpose of hearing. *Wisconsin v. Illinois,* 278 U. S. 367, 369-70.

After three hearings before this Court and two references to a Special Master, this Court on April 21, 1930 entered its decree and judgment in said suits for the purpose of carrying out the conclusions set forth in the opinions of this Court announced on January 14, 1929, (278 U. S. 367) and April 14, 1930 (281 U. S. 179). While this decree does not set out the specific measures to be taken by the Sanitary District of Chicago and the State of Illinois to effect compliance with its provisions with reference to the sewage treatment works' construction program, the decree does require that the diversion of water from the Great Lakes-St. Lawrence watershed through the Chicago Drainage Canal be limited as follows:

(a) On and after July 1, 1930, to an annual average diversion not to exceed 6500 cubic feet per second, in addition to domestic pumpage;

(b) On and after December 31, 1935, to an annual average diversion not to exceed 5000 cubic feet per second, in addition to domestic pumpage;

(c) On and after December 31, 1938, to an annual average diversion not to exceed 1500 cubic feet per second, in addition to domestic pumpage.

The Court in its opinion of April 14, 1930, approved the recommendation of the Master that the entire system of sewage treatment works of the Sanitary District of Chicago be completed by December 31, 1938, and that the West Side Treatment Works be completed and in operation not later than December 31, 1935. (281 U. S. 179, 199; Report of the Special Master on Re-reference, filed December 17, 1929, pages 81, 142.)

IV.

Thereafter the decree of April 21, 1930 was enlarged by the Court in 1933, after extended hearings before Honorable Edward F. McClennen, Special Master.

On May 22, 1933 the Court entered a decree enlarging the original decree of April 21, 1930, by the addition of the following provision:

> "That the State of Illinois is hereby required to take all necessary steps, including whatever authorizations or requirements, or provisions for the raising, appropriation and application of moneys, may be needed in order to cause and secure the completion of adequate sewage treatment or sewage disposal plants and sewers, together with controlling works to prevent reversals of the Chicago River if such works are necessary, and all other incidental facilities for the disposition of the sewage of the area embraced within the Sanitary District of Chicago so as to preclude any ground of objection on the part of the State or of any of its municipalities to the reduction of the diversion of the waters of the Great Lakes-St. Lawrence system or watershed to the extent, and at the times and in the manner, provided in this decree." (289 U. S. 395).

V.

The decree of April 21, 1930 as enlarged, as respondents are severally informed and believe, provided for a gradual reduction in the unlawful diversion of water and a gradual, rather than immediate, restoration of complainants' rights in order to permit the defendants to construct works claimed to be necessary to safeguard the health of the residents of the Sanitary District of Chicago; and the dates and amounts of the progressive reductions in the unlawful diversion provided by the decree of this Court were fixed and determined by the findings of fact as to the time within which the various works, claimed by the defendants to be essential to purify the sewage of Chicago and protect the health of its people, could be constructed and placed in operation. (*Wisconsin v. Illinois,* 281 U. S. 179.) The basis and reasons for the progressive rather than instantaneous termination of the unlawful diversion were set forth in the opinion of this Court, rendered by Mr. Chief Justice Taft, in *Wisconsin v. Illinois,* 278 U. S. 367, where the Court said:

> "* * * If the view urged by the complainants is right, the necessity for the use of the 8,500 cubic feet a second to save the health of the inhabitants of the Sanitary District will then present the problem of the power and discretion of a court of equity to moderate the strict and immediate rights of the parties complainant to a gradual one which will effect justice as rapidly as the situation permits. The framing of the decree will then require the careful consideration of the Court" (pp. 410-411)

and further:

> "* * * In these circumstances we think they are entitled to a decree which will be effective in bringing that violation and the unwarranted part of the diversion to an end. But in keeping with the principles

on which courts of equity condition their relief, and by way of avoiding any unnecessary hazard to the health of the people of that section, our decree should be so framed as to accord to the Sanitary District a reasonably practicable time within which to provide some other means of disposing of the sewage, reducing the diversion as the artificial disposition of the sewage increases from time to time, until it is entirely disposed of thereby, when there shall be a final, permanent operative and effective injunction." (pp. 418-19)

"* * * The situation requires the District to devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition adequate plants for the disposition of the sewage through other means than the Lake diversion.

"Though the restoration of just rights to the complainants will be gradual instead of immediate, it must be continuous and as speedy as practicable, and must include everything that is essential to an effective project." (pp. 420-421)

VI.

The decree of April 21, 1930, as modified on May 22, 1933, finally adjudged and determined the rights of the respondents and the duty and obligation of the petitioner. The rights of the respondents so adjudged and determined, were to have the diversion over and above 1500 second feet plus domestic pumpage terminated immediately to the end that the great continuing damage to the respondents and their peoples caused by said illegal diversion should be brought to an end as speedily as possible. The restoration of the adjudged rights of respondents and their peoples was postponed and made gradual, as a matter of favor to petitioner and its agency, The Sanitary

District of Chicago, upon the representation of petitioner and its said agency that, notwithstanding their adjudged wrong, they should be given an opportunity and a reasonable time within which to construct sewage disposal works and all ancillary facilities necessary for the complete treatment of all of the sewage of The Sanitary District of Chicago. The decree specifically imposed upon the petitioner the duties—(1) to reduce the diversion at the time and in the amounts specified in the decree, and (2) to complete said sewage treatment works and ancillary facilities "so as to preclude any ground of objection on the part of the State or of any of its municipalities to the reduction of the diversion of the waters of the Great Lakes-St. Lawrence System or watershed to the extent, and at the times and in the manner, provided in this decree."

VII.

This Court found that the times fixed by the Master for the completion of the various sewage disposal works proposed by petitioner and its said agency were as liberal as the evidence permitted (281 U. S. 179, 199). With any reasonable diligence, all of said sewage disposal works and ancillary facilities could easily have been fully completed and placed in operation before the time fixed for the ultimate termination of the illegal diversion on December 31, 1938. After inexcusable delays during 1930-1932 in the construction program proposed by petitioner and its agency, petitioner and its agency in November 1932, filed a response to a rule to show cause issued by this Court on October 10, 1932, in which petitioner and its agency advised this Court that, notwithstanding previous delays, adequate time remained for the completion of the sewage disposal works and ancillary facilities within the time fixed by the decree for the ultimate termination of

the illegal diversion. Although petitioner and its agency were never reasonably diligent in prosecuting the construction program involved in providing complete treatment for all of the sewage of The Sanitary District of Chicago, the progress of construction, as measured by the construction expenditures reported from year to year to this Court by The Sanitary District of Chicago, plainly show that all of these works could have been completed and placed in operation well before the time fixed for termination of the illegal diversion, if the construction program were prosecuted with any reasonable diligence and funds were provided for that purpose.

Petitioner does not allege that the time granted by this Court was inadequate for the construction of such works, but merely alleges that its agency, The Sanitary District of Chicago, failed to provide sufficient funds for the performance of this duty of petitioner and its agency under the decree. The deficiency in funds so provided is alleged to have been approximately $9,000,000. The resources and credit of the petitioner were sufficient to have provided many times this sum. It conclusively appears from the Semi-annual Reports filed by The Sanitary District in this Court and from the petition filed by the State of Illinois in response to which the instant rule to show cause was issued, that the State of Illinois has not at any time made available State funds or State credit for the purpose of performing the duty of the State under the decree. This default of the State in the performance of its duty under the decree stands wholly unexplained and unexcused in the petition.

VIII.

To the extent, if at all, that unsatisfactory sanitary conditions obtained in the Chicago Drainage Canal, Illi-

nois Waterway or upper Illinois River after the termination of the illegal diversion in 1939, those conditions arose, and were created, solely by the neglect or wilful default of petitioner in the performance of its duty under the decree. By the terms of the decree, it was the duty of the petitioner to provide by December 31, 1938 complete treatment of all of the sewage of The Sanitary District of Chicago through suitable and adequate works which would provide 85 per cent to 90 per cent or more purification of all of the raw sewage of said District. The works necessary, suitable and adequate to accomplish this purpose were proposed and selected by petitioner or its agent; and the postponement of the termination of petitioner's wrong was granted by this Court upon the representation that such works would be completed within the times found reasonable by this Court. In fact, on December 31, 1938, petitioner and its said agency had only provided treatment of *varying degrees* for *part* of the sewage of The Sanitary District; and such partial and incomplete treatment provided only 37.7 per cent purification of the sewage of said District. Consequently any unsatisfactory sanitary conditions which existed during 1939 upon the waters described in the petition, were the result of the neglect and default of petitioner in the performance of its duty under the decree.

IX.

The plan proposed and adopted by petitioner and its agency for the complete treatment of all of the sewage of The Sanitary District of Chicago consisted of four major sewage disposal plants with necessary intercepting sewers and ancillary facilities, to-wit: the Calumet Plant, the North Side Plant, the Southwest Side Plant and the West Side Plant. The Master found that with reasonable

diligence the North Side Plant with appurtenances should be completed on or before July 1, 1930; that the Calumet Plant should be completed and in operation by December 31, 1933; that the West Side Plant with appurtenances should be completed on or before December 31, 1935 and the Southwest Side Plant with appurtenances should be completed on or before December 31, 1938.

The *West Side Plant* is designed to serve a population equivalent of 1,800,000. Although the Master found that this plant should have been completed with reasonable diligence on or before December 31, 1935, it has not yet been completed. At the present time this plant is providing only preliminary treatment in Imhoff tanks, which is only 33⅓ per cent treatment. Not only has this partially treated sewage been discharged into the waters described in the petition ever since December 31, 1935, but during a large part of that time no provision whatever was made for taking care of the sludge from the Imhoff tanks and such sludge was discharged into the waters described in the petition. The default of the petitioner and its agent with reference to the completion of the West Side Plant and ancillary facilities has, therefore, contributed very greatly to such pollution, if any, as has existed in the waters described in the petition since December 31, 1935, and continues to contribute to such pollution, if any, as exists in those waters.

The *Southwest Side Plant,* designed to treat the sewage of a population equivalent of 2,462,000, was not completed nor in operation on January 1, 1939. This plant was placed in partial operation in June 1939, but was not completed and placed in full operation until October 1939 after the critical period had ended for the 1939 season. The result was that such pollution, if any, as appeared in the waters described in the petition during 1939, was in no small degree due to the default of the peti-

tioner in the performance of its duty with respect to this plant. At the present time the Racine Avenue Pumping Station, which is necessary to deliver 25,000,000 gallons of raw sewage daily to this plant for treatment, is not yet completed; and consequently this raw sewage is still being discharged by petitioner, or its agent, to the waters described in the petition.

The *North Side Plant* is designed to treat the sewage of a population equivalent of 1,291,000. While this plant was completed and placed in operation during 1930, for many years the petitioner or its agent, The Sanitary District of Chicago, made no arrangements to take care of the sludge produced by this plant but simply discharged the sewage into the Drainage Canal with the result of nullifying in a large degree the benefit which should have been obtained from the completion and operation of this plant. Whether this condition was remedied during 1939 and if so, at what time during 1939, respondents are not advised and put the petitioner to its proof. Respondents further allege that throughout 1939, and now, petitioner's agency, The Sanitary District, failed to provide a proper supply of air for the operation of the aeration tanks at the North Side Plant and thereby to a substantial extent nullified, and are still nullifying, the benefits which should be obtained from a reasonable and competent operation of that plant. The result was that such pollution, if any, as appeared in the waters described in the petition during 1939, was in part due to the failure and neglect of the petitioner and its agent to operate this plant in a normal and reasonable manner.

As of January 1, 1939, the *Calumet Plant,* with a designed capacity for the treatment of the sewage of a population equivalent of 440,000, was completed and in operation. However, the connections with the Blue Island intercepting sewer, built to convey the raw sewage to this

plant for treatment, were only 98 per cent completed on December 31, 1938. (Final Semi-Annual Report, p. 4.) A completed sewage disposal plant is not fully effective for the reduction of pollution unless and until all the ancilliary facilities for conveying the raw sewage to the plant for treatment are completed and placed in operation. In the case of the Calumet Plant, this had not been done, as respondents are advised and believe, and therefore allege, as of January 1, 1939.

The *Southwest Side Plant* will be in full operation during 1940. According to the allegations of the petition certain additional defaults of petitioner will have been cured before the Summer season of 1940. Consequently the conditions obtaining in the waters described in the petition, whatever they may have been during 1939, will be no measure of conditions to be anticipated during 1940. Of course, the default of petitioner, resulting in the discharge of large quantities of untreated or partially treated sewage into the waters described in the petition has undoubtedly resulted in deposits of sludge which will to some extent affect conditions in 1940, although the effects of such past defaults will not extend beyond that season.

X.

Respondents are informed and believe, and therefore allege, that whether or not the Great Lakes are averaging a foot higher than they have averaged over the past eight years is irrelevant and immaterial. Respondents further deny this allegation and show that, as disclosed by the latest chart of the United States Lake Survey, the levels of Lakes Michigan and Huron at the end of January, 1940, were only 46/100ths of a foot higher than the an-

nual mean average for the preceding eight years; but the level of Lake Erie was 24/100ths of a foot *below* the annual mean average for the preceding eight years and that the level of Lake Ontario was 45/100ths of a foot *below* the annual mean average for the preceding eight years and that the trend of lake levels is downward at the present time. Respondents further show that petitioner bases its comparison upon an eight year period, during which the normal levels of the Great Lakes were substantially lower than they otherwise would have been, by reason of the illegal diversion of petitioner, and that petitioner takes nothing by comparison with conditions produced by its own wrong.

XI.

That the illegal diversion of water from Lake Michigan by petitioner has substantially lowered the natural levels of the Great Lakes, that such lowering of the natural levels of the Great Lakes has caused great continuing damage to respondents and their citizens and that the restoration of normal lake levels and the termination of such continuing damages to respondents and their citizens will require a period of five years after the termination of the illegal diversion of petitioner from Lake Michigan, are severally *res judicata* under the decree of this court. The modification of the decree requested by the petitioner would, if granted, postpone the restoration of normal lake levels and the termination of these continuing damages to respondents and their citizens for a period of four years. During most of the navigation season of 1939, the draft of vessels carrying the great ore, coal and grain traffic between the head of the Lakes and lower lake ports was restricted to 19 feet, greatly reducing the loads which could be carried by vessels carrying 90 per cent of this

traffic in comparison with the loads which could have been carried but for the lower lake levels caused by the petitioner's diversion.

XII.

The Respondents deny that any unhealthful conditions obtained in the Chicago Sanitary Canal, the Des Plaines or Illinois Rivers or areas adjacent thereto during the year 1939 and further deny that any unhealthful conditions will obtain during the summer of 1940.

The reports submitted to the U. S. Public Health Service by the State Health officer for the State of Illinois disclose no unusual incidence of waterborne or other diseases on or along any of the waters described in the petition.

Typhoid fever cases in communities along the Illinois Waterway in 1939 were far fewer than in the balance of the state of Illinois. There were 140 typhoid fever cases in Illinois in a 4,670,660 population, or slightly more than 3 cases of typhoid per 100,000 population from the territory tributary to the Illinois Waterway during 1939; while the remaining counties of the state (excepting Kankee County) with a population of 2,909,899, produced a total of 328 typhoid fever cases, or an average of 11.4 cases per 100,000 population during 1939.

No one of the cities mentioned in the petition, namely, Argo, Lemont, Lockport, Joliet, Morris, Marseilles, Ottawa, and La Salle, Illinois, takes its drinking or domestic water from the Illinois Waterway. All such cities or towns, except Argo, obtain their drinking supply from wells located in the vicinity thereof.

Whether, and if so to what extent, petitioner has received the complaints from certain municipalities set

forth in the petition, respondents are not advised and therefore neither admit nor deny the same; but in that connection respondents allege that complaints about the nuisance conditions created in these waters by The Sanitary District of Chicago were continually and repeatedly made by municipalities along such waters for twenty years prior to the entry of the instant decree and that petitioner was never moved to take any action by reason of said complaints. Petitioner is without equity now to urge such complaints as the basis for continuing its adjudged wrong and for postponing the restoration of the adjudged rights of respondents. Respondents further allege that the principal alleged complaining municipalities cited in the petition, to wit, Lemont, Lockport and Joliet dump their raw sewage into said water courses and contribute to the alleged conditions of which they are alleged to complain.

XIII.

Petitioner's request for a temporary increase in diversion to December 31, 1942, is premised on the alleged need for additional time to complete the West Side Sewage Treatment Plant in order to provide ultimate treatment of 100% of all the sewage of the District on an 85 to 90% or more treatment basis. This treatment can be attained at once with existing installations by the efficient operation and maintenance of such facilities and by any one of the following methods, or combinations thereof:

(a) By increasing the amount of sewage from the West Side area which is treated in the Southwest Side Treatment Works, so as to provide complete treatment of a larger amount at the Southwest Side Sewage Treatment Plant.

(b) By increasing the efficiency of all of the plants now operated by the Sanitary District of Chicago,

namely, the North Side Plant, the Calumet Plant, the West-Southwest Side Plants, to approximately 93-95% instead of 85% efficiency now provided for. The efficiency of these plants has been reduced by reason of the failure of the Sanitary District to operate already installed equipment so as to provide sufficient air for the aeration tanks.

(c) By the addition of supplementary chemical treatment to all or part of the West Side sewage flow, which would substantially double the efficiency of the Imhoff tanks in the removal of biochemical oxygen demand in the sewage at the West Side Treatment Works.

(d) In addition to the above changes, there is another step which should be adopted so as to further increase the efficiency of the existing sewage disposal plants and augment their capacity, and that is the adoption of a complete metering program for the entire domestic consumption of the City of Chicago. Such a metering program would reduce the per-capita consumption of water from about 300 to 160 gallons per day and the capacity of the sewage treatment work of the Sanitary District would be increased so much that no addition to the present facilities would be required for a great many years.

XIV.

The primary obligation and duty to perform the decree herein rests upon the State of Illinois, of which the Sanitary District of Chicago is a mere political agency. (289 U. S. 395, 289 U. S. 710) The credit and financial resources of the State of Illinois are more than ample to finance the performance of the decree. In the petition filed with this Court on January 15, 1940, the State of Illinois confesses her default and

failure to provide the monies needed to finance a prompt and full compliance with this Court's decrees. The representations made to this Court in the petition disclose that the State of Illinois has made no real effort to place the financial resources of the State at the disposal of the Sanitary District of Chicago or to provide the needed monies for the construction and completion of adequate sewage treatment plants, sewers, and facilities for the disposition of all the sewage of the Sanitary District of Chicago. If the credit and resources of the Sanitary District were inadequate for that purpose, as they are not, that would not excuse the failure of petitioner to perform the decree. The default of the State of Illinois in this regard affords no reason for further delay in the performance of the decree.

XV.

Petitioner alleges that the object of its request is to obtain a temporary increase in the diversion to aid in the disposal of the sewage of the Chicago metropolitan area pending the completion of the sewage disposal works which, with reasonable diligence, on the part of petitioners, should have been completed long since. Respondents are severally informed and believe, and therefore allege, that one of the objects of this Application by petitioner is to obtain additional water from Lake Michigan for the generation of hydroelectric power at the site owned by the Sanitary District of Chicago at Lockport, Illinois, and at other sites owned by the State of Illinois and situated on the so-called Illinois Waterway between Lockport and Starved Rock, Illinois. The additional diversion sought by the Application would increase the value of the electrical energy generated at the Lockport plant of the Sanitary District of Chicago by approximately $100,000 per annum,

as respondents are informed and believe, and therefore allege.

The State of Illinois now has pending before the Federal Power Commission an Application for licenses under the Federal Power Act to develop water power at all of the power sites between Lockport and Starved Rock, Illinois, which include all of the commercial power sites between Lake Michigan and the Mississippi River. The amount of water available for power development along this reach is dependent upon the amount of diversion from Lake Michigan and by means of said diversion is made substantially uniform throughout the year. The hydraulic capacity of the hydroelectric generating machinery which, as disclosed by its Application for license before the Federal Power Commission, the State of Illinois proposes to install greatly exceeds the present direct diversion from Lake Michigan, plus domestic pumpage, plus natural flow, and would be practically useless without a large increase in the present diversion. These declared intentions of the State of Illinois establish a purpose to circumvent the performance of the decree of this Court and the restoration of the just rights of the respondents and their peoples as declared by this Court and an intention also evidenced by the past conduct of the petitioner, to secure in some way a large permanent diversion for water power at the expense of the rights of the respondents and their peoples.

XVI.

For many years the Sanitary District of Chicago, as agency of State of Illinois, wilfully disregarded and defied the Federal Government and presumed upon the solicitude of the Federal Government for the health and welfare of the people of Chicago to prevent the Federal Government from enforcing its order and terminating the wrongful action of the District.

Thereafter, the Sanitary District of Chicago as agency of the State of Illinois for many years interposed the claim of necessity of protecting the health of the people of the District to prevent, hinder or impede a restoration to the respondents and their peoples of their just rights. In *Wisconsin v. Illinois,* 287 U. S. 367, at 419-20, Mr. Chief Justice Taft, rendering the unanimous opinion of this Court, said:

> "* * * The Secretary of War and the Chief of Engineers in 1907 refused a permit by which there would be more than 4,167 feet a second diverted. Advised that the District authorities proposed to ignore that limitation, the United States brought suit against the authorities of the District to enjoin any diversion in excess of that quantity, as fixed in an earlier permit. Another application for enlargement was made to Secretary of War Stimson in 1913 and was rejected. For several years, including the inexcusable delays made possible by the failure of the Federal Court in Chicago to render a decision in the suit brought by the United States, the District authorities have been maintaining the diversion of 8,500 cubic feet per second or more on the plea of preserving the health of the District. Putting this plea forward has tended materially to hamper and obstruct the remedy to which the complainants are entitled in vindication of their rights, riparian and other."

And further:

> "* * * The Sanitary District authorities, relying on the argument with reference to the health of its people, have much too long delayed the needed substitution of suitable sewage plants as a means of avoiding the diversion in the future. Therefore they can not now complain if an immediately heavy burden is placed upon the District because of their attitude and course."

This petition represents another in the long chain of attempts to avoid the termination of petitioner's adjudged wrong and restoration of respondents' adjudged rights by reliance upon exaggerated and simulated dangers to public health which, if they existed, would be the result of inexcusable negligence or wilful default of petitioner over a period of nearly forty years.

XVII.

Respondents allege that a modification of the decree and temporary increase in the diversion from Lake Michigan is sought for the purposes of local sanitation and the development of water power by the State of Illinois. Respondents deny that the Secretary of War has any jurisdiction or any statutory or constitutional authority to modify the decree or, quite independently of the decree, to authorize the increased diversion requested by petitioner. Respondents further allege that the lack of any jurisdiction or authority in the Secretary of War to authorize any diversion for sanitation or water power, the purposes for which the temporary increase are sought, has heretofore been adjudicated in this suit and is *res judicata* of this issue which is now sought to be again raised by petitioner.

XVIII.

Except as otherwise herein expressly admitted or qualified, respondents deny each and every material allegation of the petition of the State of Illinois, filed with this Court on January 15, 1940.

WHEREFORE, respondents pray that the Application of the State of Illinois, petitioner, for a modification

of paragraph 3 of the decree made and entered in these causes on April 21, 1930 (281 U. S. 696) be dismissed.

Respectfully submitted,

JOHN E. MARTIN,
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Asst. Attorney General of New York,

HERBERT H. NAUJOKS,
Special Assistant to the Attorneys General.

Filed: February 26, 1940

STATE OF WISCONSIN)
)SS.
DANE COUNTY)

JOHN E. MARTIN, being first duly sworn, on oath deposes and says: That he is the duly elected, qualified and acting Attorney General of the State of Wisconsin; that he has read the foregoing return and the matters and things therein set forth are true in substance and in fact.

.....

Subscribed and sworn to before
me this ..... day of February,
A. D. 1940.

.....
Notary Public.